Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

ROBERT WOHLLEBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the District Court Has Discretion to Grant a Downward Departure of Sentence Range Under the United States Sentencing Guidelines to a Defendant in Criminal History Category I Based on Post-Offense Conduct and Rehabilitation

II.

Whether the Admission at Defendants' Criminal Trial of Statements Made in Connection with Related Civil Settlement Negotiations was permitted under Federal Rule of Evidence 408

LIST OF PARTIES

Robert Wohlleber, Defendant

Robert Miller, Defendant

Nina Miller, Defendant

United States of America, Plaintiff

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Defendant-Appellant Robert Wohlleber, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion below (App., *infra*, 1a-10a) is reported at 188 F.3d 1312. The judgment of the District Court for the Southern District of Florida dated November 13, 1996, appears in the Appendix at 11a-21a.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on September 17, 1999. A petition for rehearing was denied on December 13, 1999. App., *infra*, 25a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The relevant portion of 18 U.S.C. § 3553(b) (Application of guidelines in imposing a sentence) provides:

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was

> adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

Federal Rule of Evidence 408 (Compromise and Offers to Compromise) provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

STATEMENT OF THE CASE

Petitioner Robert Wohlleber was charged in 60 counts of a 70 count Indictment returned by a grand jury in Miami on February 28, 1995. Count 1 charged that Wohlleber conspired with co-defendants Nina Miller and Robert Miller (Miller) to (1) make materially false statements to Bank of

America (the "Bank"), (2) forge, issue, negotiate and transfer for value bills of lading falsely purporting to represent the purchase and shipment of goods, (3) execute a scheme to defraud the Bank and (4) execute a scheme to defraud by the use of wire communications. The alleged object of the conspiracy was to "funnel millions of dollars into FTM [Corporation] . . . and other companies controlled by the defendants by having the Bank of America fund and Thrifty Corporation [which owned 62.5% of FTM] . . . guarantee, the payment of . . . letters of credit for false and fictitious purchases of non-existent goods and products." In addition, the Indictment charged Wohlleber with nine counts of making materially false statements to the Bank, ten counts of making false bills of lading, twenty counts of bank fraud and twenty counts of wire fraud.

From 1984 through 1991 Wohlleber was employed by FTM Sports (FTM), a wholesale distributor of tennis and golf products. He held the position of national sales manager until 1990, when he was made vice president of sales. He had no ownership interest in FTM. Wohlleber worked under the supervision and direction of Miller, who was a part-owner and the President of FTM.

Thrifty, FTM's parent company, funded most of FTM's operating expenses. From 1985 through late 1987, with Thrifty's authorization, FTM utilized Thrifty's letter of credit facility established with the Bank to purchase merchandise for re-sale. In 1987, Thrifty arranged for FTM's own letter of credit facility with the Bank, payment of which was guaranteed by Thrifty.

Initially, all of the letters of credit applied for by FTM were for the actual purchase of merchandise. Subsequently,

Miller also began applying to the Bank for letters of credit for purported purchases of goods from Sports Marketing Limited (SML) and Cactus Golf (Cactus), companies that were affiliated with FTM and whose bank accounts were controlled by Miller.[1] There were no actual sales behind the SML and Cactus letters of credit, the money from which was used to finance FTM's operations and to pay back previous letters of credit that were maturing. In order to obtain payment from the Bank on these letters of credit, invoices, bills of lading, bank drafts and transmittal letters, purportedly from SML and Cactus, were prepared at FTM and submitted to the Bank.

Giving Wohlleber the necessary information, Miller directed Wohlleber to prepare Cactus letter of credit applications and submit them to the Bank. Once the letters of credit were received at FTM, Wohlleber, at Miller's instruction, prepared or assisted in preparing the supporting Cactus invoices, bills of lading and transmittal letters with information from Miller, which were then submitted to the Bank.[2] The Bank would transfer the letter of credit funds to Cactus and SML bank accounts that were controlled by Robert Miller. Miller then wrote checks on those accounts payable to FTM.

In April 1991, after Miller reported "financial irregularities" to Pacific Enterprises (Pacific), Thrifty's 100%

1. Miller has asserted that Thrifty officers directed him to use the letters of credit in this fashion to finance the operating expenses of FTM.

2. On several occasions, Wohlleber also assisted in the preparation of SML letter of credit applications and supporting documentation at Miller's direction when Miller and Nina Miller were out of town.

parent company, Pacific initiated an internal investigation into the operations at FTM. Within days, Miller and Pacific entered into a settlement agreement whereby Pacific agreed not to sue Miller in exchange for which Miller agreed to cooperate in Pacific's investigation of FTM and give statements and documents to Pacific's agents. Pursuant to the agreement, Miller met with Pacific's lawyers and investigators and discussed the role that he, his wife Nina, Bob Wohlleber and others played in FTM's use of letters of credit to finance its operations. Despite the settlement agreement, FTM, Thrifty and Pacific sued Robert Miller, along with Bob Wohlleber and Nina Miller, regarding their actions in connection with the SML and Cactus letters of credit. Using the statements and documents provided Miller under the settlement agreement, Pacific then petitioned the FBI and the United States Attorney's Office to bring criminal charges against the Millers and Bob Wohlleber.

This case proceeded to trial by jury on April 29, 1996, before United States District Court Judge Shelby Highsmith. Prior to trial, Miller filed a motion in limine[3] asking the district court to prohibit the Government from introducing the statements and documents Miller provided pursuant to the 1991 Settlement Agreement with Pacific. The motion was denied. Despite renewed objections during the defendants' criminal trial, Pacific's lawyers and investigators testified as to their recollection of Miller's unrecorded statements. Documents provided to them by Miller were also introduced into evidence.

On June 13, 1996, after deliberating six days, the jury found Wohlleber guilty of the conspiracy count, five counts

3. An objection or motion by one defendant was considered made by all unless a defendant specifically opted out.

of making false statements, eight counts of making false bills of lading, ten counts of bank fraud and ten counts of wire fraud. He was acquitted of all remaining counts.

Prior to sentencing, Wohlleber filed a motion for downward departure based on several factors, including his personal characteristics, family circumstances, post-offense conduct and community service. In one of the many letters submitted to the district court, Wohlleber's new employer stated that Wohlleber "has worked with honor, loyalty and integrity." In the five years between his termination from FTM and his sentencing, Wohlleber devoted much of his time to his community. As confirmed by the letters forwarded to the district court, Wohlleber coached little league baseball and youth soccer and was very involved with his church. Wohlleber's pastor described him as a "man of impeccable integrity."

At the sentencing hearing, on November 7, 1996, the district court indicated that it was denying Wohlleber's request for a downward departure, but allowed an opportunity to supplement the record. Several witnesses testified as to Wohlleber's character and integrity, as well as his activities helping others. Several parents of children coached by Bob Wohlleber traveled from Texas to testify about his positive impact on the children. A fellow church member, as well as his pastor, testified that Wohlleber gained the utmost respect from the people in the church and positively influenced many of their lives.

Following this testimony, counsel asked the Court to reconsider its decision not to grant a downward departure. The district court stated that it had reconsidered, but found that the evidence presented was not "**legally** sufficient to

constitute a **predicate** for departure." (emphasis added). In so ruling the district court stated as follows:

> [Congress and the Sentencing Commission] give us **parameters**. They give us **bases by which we can depart** . . . there are many instances that it would be almost . . . delightful to be able to say to **someone like Bob Wohlleber** — for I accept your assessments, your personal assessments . . . I accept your testimony and find it highly credible . . . But if I could, on many occasions it would just be . . . delightful to be able to say to **someone who has truly reformed in the interim, who has truly rehabilitated, who has truly tried to make amends, who has truly paid his or her debt to society**, go forth and sin no more. That is not my function. **I have not that power.**

(emphasis added). The record is clear that the district court believed that it did not have the discretion to consider post-offense conduct and rehabilitation as a ground for downward departure.

The district court determined that under the applicable sentencing guidelines Wohlleber's offense level was 24 and, as he had no priors, placed him in Criminal History Category I, which resulted in a sentencing guidelines range of 51 to 63 months. Wohlleber was sentenced to 51 months in prison, five years supervised release and a mandatory assessment of $1,700.

On appeal to the Eleventh Circuit, Miller argued that the district court erred in allowing the admission of statements made by him under the terms of the settlement

agreement with Pacific, and Wohlleber adopted that issue as part of his own appeal. The Eleventh Circuit, without discussion on the issue, found the challenge to be "devoid of merit." App., *infra*, 6a.

Bob Wohlleber raised the issue of post-offense rehabilitation as a valid ground for downward departure in his appeal before the Eleventh Circuit. After oral argument, but before the Circuit Court issued its decision on Bob Wohlleber's appeal, the Eleventh Circuit addressed the issue of post-offense rehabilitation as a ground for downward departure in *United States v. Pickering*, 178 F.3d 1168 (11th Cir. June 25, 1999). The Eleventh Circuit found that although truly extraordinary post-offense rehabilitative efforts may justify a downward departure, any such departure must occur along the criminal history axis of the sentencing table, not the offense level axis, and the district court may not grant a departure to a defendant in Criminal History Category I. After its decision in *Pickering*, the Eleventh Circuit issued its opinion on Bob Wohlleber's appeal. The Court affirmed his sentence without discussing the post-offense rehabilitation issue, finding the challenge to be "meritless." App., *infra*, 7a, n.9.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE DISTRICT COURT HAS DISCRETION TO GRANT A DOWNWARD DEPARTURE OF SENTENCE RANGE UNDER THE UNITED STATES SENTENCING GUIDELINES TO A DEFENDANT IN CRIMINAL HISTORY CATEGORY I BASED ON POST-OFFENSE CONDUCT AND REHABILITATION

The Eleventh Circuit has held that a sentencing court does not have discretion to grant a downward departure for post-offense rehabilitation, even in a truly exceptional case, to an accused in Criminal History Category I. That holding creates a square conflict among the circuits and is contrary to a decision of this Court and the plain language of the statutory provision governing departures and the United States Sentencing Guidelines. Because this case presents a recurring and important issue of federal law, the court of appeal's erroneous holding warrants this Court's review.

The Second, Third, Fourth, Eighth, Tenth and District of Columbia Circuits, applying *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2051 (1996), have held that post-offense rehabilitation is an appropriate basis for downward departure even though the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment. *United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997); *United States v. Sally*, 116 F.3d 76, 79 (3d Cir. 1997); *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997); *United States v. Jones*, 158 F.3d 492 (10th Cir. 1998); *United States v. Core*, 125 F.3d

74 (2d Cir. 1997). Those courts found that, "post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted." *Id.* The Third Circuit viewed the opportunity for downward departure based on extraordinary or exceptional rehabilitation efforts "as a chance for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and to rebuild their lives." *Sally*, 116 F.3d at 81.

In *United States v. Pickering*, 178 F.3d 1168 (11th Cir. June 25, 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 433 (Nov. 1, 1999), the Eleventh Circuit also found that truly extraordinary post-offense rehabilitative efforts may justify a downward departure. However, unlike the other circuits to address the issue, the Eleventh Circuit put a significant limitation on the manner in which a sentencing court may grant such a downward departure. The circuit court found that any downward departure based on post-offense rehabilitation must occur along the criminal history axis of the sentencing table and not the offense level axis. In so ruling, the circuit court reasoned that "a defendant's actions that demonstrate acceptance of responsibility after the offense has been committed — such as post-offense rehabilitation — 'bear only a tangential, if any, relation to [the offender's] just deserts . . . [and] instead reflect more strongly on the offender's rehabilitative potential and likelihood of recidivism,' " goals which are associated with the offender-based component of a sentence. *Id.* at 1174-75 (quoting *United States v. Mogel*, 956 F.2d 1555, 1560 (11th Cir. 1992)). Citing U.S.S.G. § 4A1.3, the circuit court also concluded that a sentencing court may not depart below

Criminal History Category I. Thus, pursuant to the Eleventh Circuit's position, a sentencing court does not have discretion to grant a downward departure for post-offense rehabilitation, even in a truly exceptional case, to an accused in Criminal History Category I, such as Bob Wohlleber.

The Eleventh Circuit's *Pickering* decision conflicts with decisions of other circuits. For instance, in *United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), the Tenth Circuit affirmed the sentencing court's decision to grant a three level downward departure to a defendant in Criminal History Category I based in part on the defendant's post-offense community service and degree of community support. Likewise, the Fourth Circuit, in *United States v. Reilly*, 178 F.3d 1288 (4th Cir. 1999) (unpublished opinion), affirmed an eleven level downward departure for "extraordinary post offense rehabilitative efforts" by a defendant in Criminal History Category I. In *United States v. DeShon*, 183 F.3d 888, 891 (8th Cir. 1999), the Eighth Circuit, in affirming a downward departure based on the defendant's post-conviction rehabilitative efforts, found that the sentencing court "is not required to explain, mechanically and in detail, why it rejected each **offense level**" in deciding the extent of the departure. (Emphasis added). This significant conflict between the circuits will not be resolved unless reviewed by this Court.

The Eleventh Circuit's holding is also contrary to 18 U.S.C. § 3553(b), the United States Sentencing Guidelines and the principles enunciated by this Court in *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2051 (1996). As this Court has explained:

> Acknowledging the wisdom, even the necessity, of sentencing procedures that take into account

> individual circumstances, see 28 U.S.C. § 991(b)(1)(B), Congress allows district courts to depart from the applicable Guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

Koon, 116 S. Ct. at 2044 (quoting 18 U.S.C. § 3553(b)). As the Sentencing Guidelines acknowledge, the district court has broad discretion as to whether and to what extent to depart in an atypical case. U.S.S.G. § 5K2.0. The decision to depart embodies the traditional exercise of discretion by the sentencing court, *Koon*, 116 S. Ct. at 2046, and neither Congress nor the Sentencing Guidelines place any requirement on the district court to determine which axis of the sentencing table is more closely associated with the departure factor. In *Koon*, this Court made clear that, once a sentencing court determines that a factor has not been expressly forbidden by the Sentencing Commission as a basis for departure, the relevant question is whether the special factor, as occurring in the particular circumstances of the case before it, is sufficient to take the case out of the "heartland" of the applicable guidelines.

The Eleventh Circuit's decision in *Pickering* and this case is an impermissible limitation on the district court's broad discretion to determine the extent of an unguided downward departure. Due to the district courts' unique role in applying the guidelines, a district court's determination as to the extent of an unguided departure is " 'quintessentially a judgment call,' . . . of a type that the law leaves almost

entirely to the sentencing court's standardless discretion." *United States v. Rostoff*, 53 F.3d 398, 409 (1st Cir. 1995) (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 52 (1st Cir. 1989)).

As the First Circuit has explained:

> In respect to unguided departures, once a sentencing court identifies a departure-justifying circumstance and decides to act upon it, there is no algebraic formula that it can invoke to quantify the departure's extent . . . there is no single, correct, "one-size-fits-all" unguided departure; rather, in any given situation, a range of widely disparate options doubtless fall within the universe of acceptable sentencing outcomes.

53 F.3d at 409.

This case presents an important and recurring issue of federal law. The Eleventh Circuit's categorical preclusion of downward departures based on post-offense rehabilitation to all first-time offenders is in error and warrants this Court's review.

II.

WHETHER THE ADMISSION AT DEFENDANTS' CRIMINAL TRIAL OF STATEMENTS MADE IN CONNECTION WITH RELATED CIVIL SETTLEMENT NEGOTIATIONS WAS PERMITTED UNDER FEDERAL RULE OF EVIDENCE 408

Whether Federal Rule of Evidence 408 is applicable in criminal proceedings is a substantial question of law that has divided the circuit courts. In *United States v. Meadows*, 598 F.2d 984, 989 (5th Cir. 1979), the Former Fifth Circuit "assume[d] the applicability of Rule 408 to govern the admission of related civil settlement negotiations in a criminal trial." That holding was reaffirmed in *United States v. Hayes*, 872 F.2d 582, 589 (5th Cir. 1989) (evidence of civil settlement negotiations not admissible in criminal trial because it "stands at odds with . . . Rule 408"). The Sixth and Fourth Circuits have, likewise, determined that statements made pursuant to Rule 408 may not be admitted in criminal proceedings. *See Ecklund v. United States*, 159 F.2d 81, 84-85 (6th Cir. 1947); *United States v. Peed*, 714 F.2d 7 (4th Cir. 1983); *see also United States v. Skeddle*, 176 F.R.D. 254, 256 (N.D. Ohio 1997).

In contrast, the Second and Seventh Circuits have held that Federal Rule of Evidence 408 does not prohibit statements made in connection with the settlement of civil claims from being admitted into evidence in a criminal proceeding. *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1994) ("The primary policy justification for Rule 408's exclusion in the civil context does not apply to criminal prosecutions."); *Manko v. United States*, 87 F.3d 50, 54 (2d Cir. 1996); *United States v. Prewitt*, 34 F.3d 436, 439

(7th Cir. 1994) ("nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concerning the admissions and statements made . . . to settle claims of private parties"). A writ should be granted to resolve this significant conflict among the circuit courts of appeal.

CONCLUSION

A writ of certiorari should be granted to resolve the important issues of federal law presented in this petition.

Respectfully submitted

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED SEPTEMBER 17, 1999

UNITED STATES of America,

Plaintiff-Appellee,

v.

Robert O. MILLER, Jr., Nina Miller, and Robert Wohlleber,

Defendants-Appellants.

No. 96-5491.
United States Court of Appeals,
Eleventh Circuit.
Sept. 17, 1999.

* * *

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Robert Miller ("Miller"), Nina Miller, his wife, and Robert Wohlleber ("Wohlleber") were convicted in the district court of several offenses arising out of a fraudulent scheme involving letters of credit. They appeal, challenging their convictions and their sentences. We affirm.

Appendix A

I.

A.

In the mid-1980s, Leonard Straus, chairman of Thrifty Corporation ("Thrifty") and avid tennis fan, convinced Thrifty's board of directors to invest in Fox Racket Company ("Fox"), a manufacturer of tennis rackets. Straus also assisted Fox's founder, Vernon Beck, in recruiting Miller to join Fox. The result of that recruitment effort was the formation of FTM, a Thrifty subsidiary that would manufacture and market Fox rackets.[1] Miller was elected president of FTM, Wohlleber was hired as national sales manager, and Nina Miller was hired as office manager. As president of FTM, Miller received a salary of $70,000 a year, a bonus incentive, and an ownership interest in FTM. Wohlleber and Nina Miller received salaries, health insurance, and other perks.

To assist FTM financially, Thrifty allowed FTM to use its Bank of America line of credit. Later, in 1987, Thrifty arranged for FTM to obtain its own line of credit with Bank of America, which Thrifty guaranteed. Originally, FTM's line of credit was for $10 million. That amount was increased to $20 million in 1989 and then to $25 million in 1990. All credit line requests were made by Miller. Initially, Miller requested letters of credit to purchase legitimate merchandise, but once FTM had its own line of credit, Miller began requesting letters of credit for nonexistent merchandise.

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1. Subsequently, FTM expanded into other product lines including golf clubs and sporting apparel.

Appendix A

Between 1986 and 1991, Miller reported monthly to Thrifty's board and officers that FTM's profits and sales were increasing. In reality, only FTM's debt was rising. Pacific Enterprises ("Pacific"), Thrifty's parent company, discovered this discrepancy in 1991 when it ordered an audit of FTM. At approximately the same time, Pacific received a phone call on its whistle blower hotline reporting that Miller had falsified records. These two incidents led Pacific to initiate an investigation into financial irregularities surrounding FTM.

Pacific's investigators found that Miller had financed FTM using a series of fraudulent applications for letters of credit, bills of lading, and invoices. The scheme worked as follows: Miller would direct Nina Miller and Wohlleber to prepare an application for a letter of credit for one of two companies, Sports Marketing Limited ("SML") and Cactus Golf, on whose bank accounts Miller, Nina Miller, and Wohlleber had authority to write checks.[2] The application would represent that the company wished to sell sporting goods to FTM and that a letter of credit would enable FTM to pay for the goods. Typically, Wohlleber signed the name Kevin Eger, Cactus Golf's owner, to the Cactus Golf application, and Nina Miller signed the name Steve Williams, SML's owner, to the SML application. Wohlleber and Nina Miller then sent the applications to Bank of America. If the bank approved the application, it would mail a letter of credit to the seller.[3] The

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2. At least one additional FTM employee and various bank employees also unknowingly assisted FTM with its fraudulent transactions.

3. The letters of credit for SML were mailed directly to FTM; the letters of credit for Cactus Golf were sent to its office in Houston, Texas. Both companies maintained bank accounts in Miami, Florida.

seller in turn would forward the letter of credit to FTM. After receiving these letters of credit, Wohlleber or Nina Miller would create the invoices and bills of lading, evidencing the sale of (nonexistent) goods by Cactus Golf or SML to FTM, and send them on to the bank. If the bank found no discrepancies, it would disburse the requested funds by wiring them directly into the Miami bank accounts of Cactus Golf or SML.

Miller would then obtain these funds in one of two ways. Sometimes, he would write a check payable to American Diversified Sports, a subsidiary of FTM, on the bank account of Cactus Golf or SML, and then deposit the check in FTM's account. Other times, he would create false invoices showing sales from FTM to Cactus Golf or SML, and write a check on Cactus Golf or SML's bank account payable to FTM in the amount of the invoice. Miller would label these illusory sales "export sales" on FTM's books.

By April 1991, Bank of America had issued 195 letters of credit, all based on false documents, to either SML or Cactus Golf. These letters yielded FTM approximately $90,000,000. FTM and Thrifty, as FTM's guarantor, owed Bank of America $19,021,302 on outstanding letters of credit. FTM owed Thrifty an additional $20,639,757, which represented funds Thrifty, as guarantor, had paid the bank.

B.

On February 28, 1995, a grand jury in Miami, Florida returned an indictment against Miller, Nina Miller, and Wohlleber. Count one alleged a conspiracy to: (a) make

materially false statements for the purpose of influencing a federally insured financial institution in violation of 18 U.S.C. § 1014 (1994); (b) forge bills of lading in violation of 49 U.S.C. § 121 (1994);[4] (c) execute a scheme to defraud and obtain monies from a federally insured financial institution in violation of 18 U.S.C. § 1344 (1994); and (d) commit wire fraud in violation of 18 U.S.C. § 1343 (1994). In addition, the indictment contained nine counts of making false statements to a bank, ten counts of preparing false bills of lading, twenty counts of bank fraud, and twenty counts of wire fraud. The indictment also charged Miller individually with ten counts of money laundering in violation of 18 U.S.C. § 1956 (1994).

A jury trial commenced on April 29, 1996. After six days of deliberating, the jury convicted Miller of all 70 counts; Nina Miller of two counts of making false statements to a bank, eight counts of bank fraud, and eight counts of wire fraud;[5] and Wohlleber of the conspiracy count, five counts of making false statements to a bank, eight counts of making false bills of lading, ten counts of bank fraud, and ten counts of wire fraud.

Nina Miller and Wohlleber were sentenced on November 7, 1996; Miller was sentenced on November 22, 1996. Nina Miller received prison sentences totaling

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4. This provision was amended July 5, 1994, and is now codified at 49 U.S.C. § 80116 (1994).

5. The jury was unable to reach a verdict as to the conspiracy count and three counts of making false statements to a bank. Nina Miller was acquitted of the remaining charges.

33 months,[6] a five-year term of supervised release, and a $900 fine. Wohlleber was sentenced to prison for a total of 51 months, fined $1,700, and given a five-year term of supervised release. Miller received prison sentences totaling 168 months, a five-year term of supervised release, and a $3,500 fine.

As noted above, in their appeals, the appellants challenge both their convictions and their sentences. We find the challenges to their convictions, which are set out in the margin,[7] devoid of merit; we thus affirm their convictions without further discussion.[8] With one exception, which we discuss in part II below, we affirm their sentences without discussion.[9]

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6. In determining Nina Miller's base offense level, the district court found that $1,939,660 in letters of credit that were unpaid on March 31, 1991 were directly attributable to her conduct.

7. Appellants challenge their convictions on the following grounds: (1) the evidence was insufficient to convict Wohlleber; (2) the district court's supplemental instructions to the jury (in response to a jury question) were unbalanced; and (3) the district court abused its discretion in several evidentiary rulings. These rulings involved (a) the court's exclusion of a Pacific Enterprises' internal audit report; (b) the court's admission of statements made by Miller under the terms of a settlement agreement with Thrifty; (c) the court's refusal to allow Miller to present certain evidence and pursue various lines of inquiry; (d) the court's admission of Richard Eils' deposition into evidence; (e) the court's admission of James Ukropina's statement into evidence; and (f) the court's questioning of witness Steve Williams.

8. *See* 11th Cir. R. 36-1.

9. Miller claims that the court erred in increasing his base offense level by four levels for his role as a leader or organizer of

(Cont'd)

Appendix A

II.

With the exception of Miller's money laundering convictions, all of the appellants' offenses are governed by Sentencing Guidelines section 2F1.1. Miller's money laundering offenses are governed by Sentencing Guidelines section 2S1.1.

Under section 2F1.1, a defendant's base offense level is determined by the amount of the victims' loss. The victims in this case are Bank of America and Thrifty; their losses are calculated as of March 31, 1991, the day on which the fraud was discovered (a point that appears undisputed). The district court calculated the victims' combined loss at $39,661,059. Of that amount, $19,021,302 represents the letters of credit outstanding to Bank of America when the fraud was discovered on March 31, 1991. The rest, $20,639,757, represents the amount FTM owed Thrifty on fraudulent letters of credit Thrifty reimbursed the bank as FTM's guarantor. To arrive at $20,639,757, the court applied a straight composite average[10] of .748 to the amount FTM owed Thrifty on all letters of credit, $27,593,258.

(Cont'd)
the fraudulent letter-of-credit scheme. Nina Miller contends that her crime was victimless. Wohlleber claims that the court erred in refusing to grant a downward departure from the guideline sentence range based on his post-offense rehabilitation. We affirm appellants' sentences without discussing these challenges because we find the challenges meritless. *See* 11th Cir. R. 36-1.

10. The Government proposed a weighted average in lieu of a straight composite average, but the district court rejected its approach as too speculative. The Government's calculations yielded an intercompany debt of $22,146,349 and a total loss of $41,167,651.

The district court's loss calculation only affected Wohlleber's sentences. Miller's offenses were grouped into two groups: group I consisted of the money laundering counts and group II consisted of the remaining counts. *See U.S. Sentencing Guidelines Manual* § 3D1.4 (1998). The offense level for group I was 35 and, given Miller's criminal history category of I, yielded a sentence range of 168 to 210 months imprisonment. This range was higher than the level 28 range associated with the group II convictions. Accordingly, after sentencing Miller to a total of 168 months imprisonment for the group I offenses, the court sentenced Miller on the group II counts to consecutive prison sentences totaling 168 months,[11] which were to run concurrently with the group I sentences.

This court reviews findings of fact on sentencing matters for clear error. *See United States v. Miller*, 166 F.3d 1153, 1155 (11th Cir.1999). The district court found the total amount of loss to be $39,661,059. This figure represents the amount outstanding to Bank of America and Thrifty on March 31, 1991 — which, as noted above, was the date the defendants' fraud was discovered. None of the appellants seriously disputes the court's calculation of the amount outstanding to the bank: $19,021,302. The appellants do, however, challenge the district court's calculation of the amount outstanding to Thrifty.

Appellants argue that the court double counted letters of credit when calculating FTM's debt to Thrifty. This is

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11. The sentences for Miller's group II offenses ranged from 24 to 60 months.

untrue. The court found, based on intercompany debt reports, that the total amount FTM owed Thrifty for letters of credit was $27,593,258. The court could not precisely calculate the amount of this figure attributable to fraudulent letters of credit for two reasons. First, much of the documentation relating to these transactions was missing. Second, FTM frequently did not indicate on its payments (to Thrifty) which letters of credit were being repaid. Therefore, the court had to estimate what percentage of $27,593,258 the fraudulent letters of credit encompassed.

Basing its calculations on Bank of America's documents, the court determined the percent of fraudulent letters of credit outstanding for each quarter from September 1986 until March 1991. In turn, the court determined the average of those percentages (74.8%) and applied that number to the $27,593,258 that was outstanding to Thrifty on March 31, 1991. Although the result ($20,639,757) was not precise, it was reasonable. The sentencing guidelines recognize that often the amount of loss caused by fraud is difficult to determine accurately. Thus, courts may reasonably estimate that amount. *See U.S. Sentencing Guidelines Manual* § 2F1.1 commentary n. 9 (1998) ("For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information."); *see also United States v. Wilson*, 993 F.2d 214, 218 (11th Cir.1993). Given the little information available to it, the district court's estimation of the loss defendants' fraud caused Thrifty, Pacific, and Bank of America was reasonable. In sum, we affirm the district court's finding that the loss to Thrifty and Pacific was $20,639,757; the loss to Bank of America was $19,021,302; and the total loss was $39,661,059.

Appendix A

III.

Appellants' convictions and sentences are

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED NOVEMBER 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number: 1:95CR00139-003

UNITED STATES OF AMERICA

v.

ROBERT WOHLLEBER

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

David Rothman, Esq. Alicia Valle, AUSA
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 4-7, 10, 11-15, 17, 18, 20, 21, 23, 25, 28, 29, 34, 35, 37, 39, 40, 41, 43, 45, 48, 49, 54, 55, 57, 59 and 60 after a plea of not guilty.

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Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Commit Bank Fraud and Wire Fraud	04/30/1991	1
18 U.S.C. § 1014	Making False Statement to a Bank	06/21/1988	4
18 U.S.C. § 1014	Making False Statement to a Bank	08/22/1988	5
18 U.S.C. § 1014	Making False Statement to a Bank	11/28/1988	6
18 U.S.C. § 1014	Making False Statement to a Bank	04/26/1989	7
18 U.S.C. § 1014	Making False Statement to a Bank	12/27/1989	10
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	03/15/1990	11
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	03/22/1990	12

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49 U.S.C. § 121	Uttering Forged and False Bills of Lading	05/03/1990	13
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	05/31/1990	14
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	07/18/1990	15
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	12/31/1990	17
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	01/22/1991	18
49 U.S.C. § 121	Uttering Forged and False Bills of Lading	02/08/1991	20
18 U.S.C. § 1344	Bank Fraud	03/20/1990	21
18 U.S.C. § 1344	Bank Fraud	05/03/1990	23
18 U.S.C. § 1344	Bank Fraud	05/31/1990	25

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18 U.S.C. § 1344	Bank Fraud	07/25/1990	28
18 U.S.C. § 1344	Bank Fraud	07/26/1990	29
18 U.S.C. § 1344	Bank Fraud	12/31/1990	34
18 U.S.C. § 1344	Bank Fraud	01/22/1991	35
18 U.S.C. § 1344	Bank Fraud	02/08/1991	37
18 U.S.C. § 1344	Bank Fraud	02/25/1991	39
18 U.S.C. § 1344	Bank Fraud	03/08/1991	40
18 U.S.C. § 1343	Wire Fraud	03/26/1990	41
18 U.S.C. § 1343	Wire Fraud	05/07/1990	43
18 U.S.C. § 1343	Wire Fraud	06/05/1990	45
18 U.S.C. § 1343	Wire Fraud	07/27/1990	48

18 U.S.C. § 1343	Wire Fraud	07/31/1990	49
18 U.S.C. § 1343	Wire Fraud	01/04/1991	54
18 U.S.C. § 1343	Wire Fraud	01/29/1991	55
18 U.S.C. § 1343	Wire Fraud	02/12/1991	57
18 U.S.C. § 1343	Wire Fraud	02/27/1991	59
18 U.S.C. § 1343	Wire Fraud	03/14/1991	60

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) **remaining counts of Indictment**

☒ Count(s) **all remaining counts, if any** are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

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Defendant's Soc. Sec. No.: 072-44-5409	11/07/1996 Date of Imposition of Judgment
Defendant's Date of Birth: 07/20/1955	
Defendant's USM No.: 48614-004	s/ Shelby Highsmith Signature of Judicial Officer
Defendant's Residence Address: 15111 Stillcreek Drive Houston TX 77070	SHELBY HIGHSMITH UNITED STATES DISTRICT COURT Name & Title of Judicial Officer
Defendant's Mailing Address: 15111 Stillcreek Drive Houston TX 77070	11/13/96 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 51 month(s) as to all counts of conviction, all to be served concurrently

☒ The court makes the following recommendations to the Bureau of Prisons:

defendant should be placed in a boot-camp facility after having served 3 months imprisonment; defendant may

remain on bond pending appeal with same bond conditions as previously imposed by the Court

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s). This term consists of one year on each of Counts 4, 5, 6 and 7; three years on each of Counts 1, 10 through 15, 17, 18, 20, 21, 23, 25, 28, 29, 41, 43, 45, 48 and 49; and five years on each of Counts 34, 35, 37, 39, 40, 54, 55, 57, 59 and 60, all to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from

imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

Appendix B

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

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12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 1,700.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

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Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

APPENDIX C — EXCERPTS FROM SENTENCING HEARING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED NOVEMBER 7, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 95-139-CR-SH
Miami, Florida
November 7, 1996
1:30 o'clock, p.m.

UNITED STATES OF AMERICA

VS.

NINA MILLER & ROBERT WOHLLEBER,

Defendants.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE SHELBY HIGHSMITH,
UNITED STATES DISTRICT JUDGE

* * *

[75] * * *

MR. ROTHMAN: I would ask that the Court consider the combination of factors of everything you have read, you [76] have heard, and ask that you reconsider your decision

not to depart, given the fact that the 39 million dollars significantly overstates Bob Wohlleber's conduct in this case. Thank you, Judge.

THE COURT: Well, first of all, let me assure you, Mr. Rothman, that I have reconsidered. I have been known on occasion to change my mind.

For the record, I will state that even having considered what has been said here, I do not find it legally sufficient to constitute a predicate for departure under the sentencing guidelines as I understand them. You know, principally because at least six of your number have traveled from, even by contemporary standards, far away — it's a long distance from here to Houston. I think that's where it was, isn't it?

MR. ROTHMAN: Yes, sir.

THE COURT: It might be time, and I say this respectfully because I'm merely a member of the third branch, not the first and second, but Reverend Matthews, it may be time for the Congress to reconsider the wisdom or not of the 1984 act that established what we call sentencing guidelines, and the sentencing commission who establishes those guidelines without ever sitting in this chair or the chairs of other district judges throughout this country. They give us parameters. They give us bases [77] by which we can depart. But let me assure you, on occasion I have departed.

By the way, I make no apology for the decisions I have made here today. They have been made from both the heart and the mind. There are probably ways that this Court could

fashion a sentence, if it had unfettered discretion, that would accomplish all of the purposes of sentencing: deterrence, example, punishment, rehabilitation, all of that.

As a matter of fact, earlier today when I had asked the probation officer and another one to come over to review with me those sentencing guidelines and the options that this Court had, I observed that there are many instances that it would be almost — and I say this respectfully and not attempting to be profound — delightful to be able to say to someone like Bob Wohlleber — for I accept your assessments, your personal assessments, only God knows what kind of man Bob Wohlleber truly is; but I accept your testimony and find it highly credible, that is, your statements in this record.

But if I could, on many occasions it would just be, as I indicated, delightful to be able to say to someone who has truly reformed in the interim, who has truly rehabilitated, who has truly tried to make amends, who has truly paid his or her debt to society, Go forth and sin no [78] more. That is not my function. I have not that power.

* * * *

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 13, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-5491-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT O. MILLER, JR., NINA MILLER, and ROBERT WOHLLEBER,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE